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No. 93-1121

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1994

ED PLAUT, NANCY McHARDY PLAUT,
and JOHN GRADY, on behalf of themselves
and all others similarly situated,

Petitioners,

v.

SPENDTHRIFT FARM, INC., BATEMAN EICHLER,
HILL RICHARDS, INC., FRANCIS M. WHEAT,
GIBSON, DUNN & CRUTCHER, DELOITTE
HASKINS & SELLS, NORMAN D. OWENS,
AMERICAN INTERNATIONAL BLOODSTOCK
AGENCY, INC.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

The petition presents the following question:

"Whether Section 27A(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1, to the extent that it purports to require reinstatement of Section 10(b) actions dismissed with prejudice pursuant to judgments that became final prior to the enactment of Section 27A(b), contravenes the separation-of-powers doctrine or the Fifth Amendment Due Process Clause of the United States Constitution."

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 1 F.3d 1487, and reprinted in the Appendix to the Petition for a Writ of Certiorari ("Pet.App.") at 3a. The Memorandum Opinion and Order of the United States District Court for the Eastern District of Kentucky is reprinted in Pet.App. at 31a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).¹ The judgment of the Court of Appeals for the Sixth Circuit was entered on August 3, 1993. The Petitioners' Motion for Rehearing En Banc was denied by order entered October 14, 1993. The Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit was filed January 11, 1994, and certiorari was granted on June 6, 1994.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves Article III and the Fifth Amendment to the United States Constitution.

Section 476 of the FDIC Improvement Act of 1991, Pub.L.No. 102-242, 105 Stat. 2236, 2387 (1991), codified as Section 27A of the Securities Exchange Act of 1934, 15

¹ The caption includes all parties to the case below.

U.S.C. § 78aa-1 ("Section 27A(b)"), provides in pertinent part:

(b) Effect on dismissed causes of action.

Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991, -

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

shall be reinstated on motion by the plaintiff not later than 60 days after Dec. 19, 1991.

STATEMENT OF THE CASE

Proceedings in the District Court

Beginning on November 22, 1983, Respondent, Spendthrift Farm, Inc., publicly offered and sold shares of its common stock to the Petitioners, and others. On November 20, 1987, the Petitioners filed this action in the United States District Court for the Eastern District of Kentucky, on behalf of themselves and all others similarly situated, seeking damages for securities fraud committed by the Respondents, who are the issuers, accountants, legal counsel, underwriter and experts involved in the public offering. The complaint alleges that the Respondents made false or misleading statements of material

fact in connection with the offering and sale of the securities, in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5.

Respondents filed a motion to dismiss, including a motion predicated on the alleged failure to comply with the three-year statute of limitations that had long been recognized by the Sixth Circuit as applying to private actions under Section 10(b).² The three-year period began to run when "the fraud is or should have been discovered."³ Although the Petitioners' complaint was filed more than three years after the offering, the Magistrate Judge, to whom the case had been referred for pretrial rulings, found that the complaint was timely under the applicable law and, accordingly, recommended that the Motion to Dismiss on limitations grounds be denied. As of June 20, 1991, the District Court had not yet ruled on that recommendation.

On June 20, 1991, this Court decided *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) and *Beam Distilling Corp. v. Georgia*, 501 U.S. 529 (1991). In *Lampf* this Court held that the limitations period for private actions under Section 10(b) is found in Section 9(e)

² Prior to the decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), the law in the Sixth Circuit provided that the statute of limitations for private actions under Section 10(b) filed in Kentucky was the three-year period contained in the Kentucky Blue Sky law. KY.REV.STAT. § 292.480 (Baldwin 1993).

³ See *Herm v. Stafford*, 663 F.2d 669 (6th Cir. 1981); *Carothers v. Rice*, 633 F.2d 7 (6th Cir. 1980).

of the Securities Exchange Act, 15 U.S.C. § 78i(e). A securities fraud action, therefore, must be filed within the earlier of one year after discovery or three years after the fraud. 111 S.Ct. at 2782. The Court applied the new limitations period to the parties before it in *Lampf*. *Id.* On the same day, this Court held in *Beam* that, when a new judicial interpretation of the law is applied to the parties in the case in which it is announced, the new rule must be applied to all other pending cases. 111 S.Ct. at 2446, 2448.

On August 13, 1991, the District Court, applying *Lampf* and *Beam*, dismissed the Petitioners' complaint with prejudice. The Order of Dismissal is reprinted in the Joint Appendix ("J.App.") at 6. The Petitioners declined to file what the Sixth Circuit Court of Appeals noted would have been a "meritless and indeed sanctionable appeal." 1 F.3d at 1489; Pet.App. at 5a. The Order of Dismissal became final on September 12, 1991. 28 U.S.C. § 2107.

Three months later, on December 19, 1991, Congress enacted the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub.L.No. 102-242, 105 Stat. 2387 (1991). That Act amended the Securities Exchange Act by adding Section 27A(b), which provided a new statute of limitations for Section 10(b) claims pending on July 19, 1991. Section 27A(b) is a remedial provision designed to provide a new form of redress for thousands of defrauded plaintiffs who were unexpectedly deprived

of their day in court by the retroactive application of this Court's decision in *Lampf*.⁴

On February 11, 1993, Petitioners filed a timely Motion to Reinstate this action pursuant to Section 27A(b). Although the District Court specifically found that the complaint was timely under the pre-*Lampf* limitations period, it held that Section 27A(b) was unconstitutional as contravening the Fifth Amendment Due Process Clause and the separation of powers doctrine and, accordingly, denied the Motion to Reinstate. 789 F.Supp. 231, Pet.App. at 31a.

The Opinion of the Court of Appeals

The Court of Appeals affirmed. Despite vigorous urging by the Respondents, the Court of Appeals declined to base its ruling below on the "vested rights" doctrine.⁵ Instead, it based its decision on what it found

⁴ Section 27A(a) provides a remedy for plaintiffs whose claims were pending on December 19, 1991. The constitutionality of Section 27A(a) is no longer in issue. *See, e.g., Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78 (2d Cir. 1993); *Cooke v. Manufactured Homes Inc.*, 998 F.2d 1256 (4th Cir. 1993); *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir. 1993); *Berning v. A.G. Edwards & Sons, Inc.*, 990 F.2d 272 (7th Cir. 1993); *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993); *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 1841 (1993); *Henderson v. Scientific-Atlanta*, 971 F.2d 1567 (11th Cir. 1992), cert. denied, ___ U.S. ___, 114 S.Ct. 95 (1993).

⁵ "We do not base our decision primarily on this so-called 'vested rights doctrine,' despite its prominent separation of powers component, because the asserted ability of Congress to

to be an absolute constitutional rule that the final judgments of the federal courts are sacrosanct and utterly beyond the reach of Congress, based almost entirely on separation of powers principles. See 1 F.3d at 1493-94; Pet.App. at 13a-15a.

The Court first engaged in a lengthy discussion of the historical development of the separation of powers doctrine and a detailed analysis of *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). The Court drew from those historical antecedents and authorities the constitutional principle that "Congress may not retroactively [disturb, annul or vacate] final judgments of the Federal courts." 1 F.3d at 1493, 1499; Pet.App. at 13a, 26a. It found that rule to be absolute. "We believe the rule [that Congress may not retroactively disturb final judgments of the Federal Courts] to be not only alive but vital to the continuing integrity of the independent Federal judiciary; further, we believe no true exceptions to the rule exist." *Id.* at 1494; Pet.App. at 15a. Because it could not "square § 27A(b) with *Hayburn's Case*," *id.* at 1493; Pet.App. at 14a, and because it distinguished every other case in which Congress affected a final judgment, the Court of Appeals concluded that Section 27A(b) was an unconstitutional usurpation of the Judicial Power. *Id.*

Other Proceedings

This Court addressed the same issues raised by the instant petition in *Morgan Stanley & Co., Inc. v. Pacific*

disturb rendered final judgments does not hinge on the nature of the judgment and its property value to the prevailing litigant, a central rationale of the vested rights doctrine." 1 F.3d at 1494 n.12, Pet.App. at 14a.

Mut. Life Ins. Co., ___ U.S. ___, ___ S.Ct. ___ (1994), in which it reviewed the decision of the Fifth Circuit Court of Appeals upholding the constitutionality of Section 27A(b).⁶ The Fifth Circuit rejected the defendants' argument that Section 27A(b) violated their constitutional rights under the Fifth Amendment Due Process Clause, citing *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314-15 (1945). 997 F.2d at 49-50. The Court also declined the request to strike Section 27A(b) as an affront to the Article III Judicial Power under the separation of powers doctrine. It spurned the doctrinaire approach adopted by the Sixth Circuit, and held that Congress and the judiciary share the power to determine when "the judiciary's word on a controversy is its last." *Id.* at 55. This Court granted certiorari and affirmed the decision of the Fifth Circuit Court of Appeals in the *per curiam* opinion of an equally divided Court.⁷

A divided panel of the Court of Appeals for the Tenth Circuit, adopting much of the reasoning of the Court of Appeals for the Sixth Circuit in the opinion below, struck down Section 27A(b) on both separation of powers and due process grounds. *Johnson v. CIGNA Corp.*, 14 F.3d 486 (10th Cir. 1994). Judge Holloway filed a well-reasoned dissent in which he urged adoption of the analysis of the Fifth Circuit in *Pacific Mutual*. *Id.* at 497-502.

⁶ See *Pacific Mut. Life Ins. v. First Republicbank*, 997 F.2d 39 (5th Cir. 1993).

⁷ ___ U.S. ___, ___ S.Ct. ___ (1994). Justice O'Connor took no part in the consideration or decision of the case.

SUMMARY OF THE ARGUMENT

Section 27A(b) was a valid exercise of the Legislative Power by a Congress determined to rectify the injustice visited upon the Petitioners, and others similarly situated, by the retroactive application of the decision in *Lampf*.

1. Separation of Powers Doctrine. The separation of powers doctrine, which protects and preserves the proper distribution of powers among the three coordinate branches of the government, is to be applied flexibly with a due regard to the powers and intentions of the other coordinate branches. The absolute rule adopted by the Sixth Circuit, that Congress may not retroactively disturb final judgments of the Federal Courts, does not comport with this Court's precedents or the flexible approach to the separation of powers doctrine contemplated by the Framers.

The principles in *United States v. Sioux Nation*, 448 U.S. 371 (1980), fully support the constitutionality of Section 27A(b). The argument that *Sioux Nation* merely stands for the principle that the government may waive the res judicata effect of prior favorable adjudications addresses issues under the Due Process Clause, not the separation of powers doctrine. *Sioux Nation* and the decisions upholding statutes reopening final judgments of the territorial courts and administrative bodies provide ample precedent that Section 27A(b) does not contravene the separation of powers doctrine.

The order of dismissal on limitations grounds in this case became "final" upon the expiration of the thirty-day period prescribed by Fed.R.App.P. 4, a rule promulgated

pursuant to legislative authority delegated by Congress to this Court. Congress had power to change the applicable limitations period before the thirtieth day. While the passage of the thirtieth day foreclosed an appeal by the parties, it did not absolutely and forever trammel the Legislative Power to make a political and policy judgment that the bar of limitations should be modified to afford an opportunity for an adjudication on the merits in accordance with the settled expectations of the parties prior to the decision in *Lampf*. The expiration of a time-period which is within the constitutional power of Congress to establish does not define the absolute and impregnable constitutional boundary of the Legislative Power in this area. Therefore, Congress does not contravene the separation of powers doctrine when it makes a political and policy judgment that a defined group of cases previously dismissed with prejudice on limitations grounds should proceed, regardless whether the parties still have a right to appeal.

Congress neither exercised nor impaired the Judicial Power by enacting Section 27A(b). It changed the law by establishing a new statute of limitations for private civil actions brought pursuant to Section 10(b) of the Securities Exchange Act that were pending on June 19, 1991. It did not set aside, annul, vacate, review or revise any prior judicial determination. It left all matters pertaining to the adjudication of all rights arising from Section 27A(b) exclusively to the courts. Therefore, Section 27A(b) was a valid exercise of the Legislative Power and does not contravene the separation of powers doctrine.

2. Due Process Clause. The test of due process under the Fifth Amendment Due Process Clause for the

retroactive aspects of legislation is whether the legislation advances a legitimate legislative purpose furthered by rational means. Section 27A(b) easily meets that test. Congress recognized the gross injustice visited upon the Petitioners and others similarly situated when their securities fraud claims were dismissed following the retroactive application of this Court's decision in *Lampf*. It was entirely legitimate for Congress, in the exercise of its power to regulate interstate commerce, to act to remedy that injustice and permit these cases to proceed to an adjudication on the merits. The means chosen were eminently rational. The procedural expedient of a motion to reinstate the dismissed actions, which Congress previously employed in *Sioux Nation*, conserved the resources of the parties and the judiciary.

Rights confirmed by an unappealable judgment are not absolute, nor should they be. If claims are sufficiently doubtful or disputed to result in litigation, they should not be stronger when determined and confirmed in a judgment than rights that are beyond dispute. Therefore, rights fixed in a judgment are not stronger or more vested for due process purposes than other property rights.

The amorphous "vested rights doctrine" is a relic, at least to the extent that it would render all final judgments absolutely sacrosanct. It should be formally rejected in favor of the more lucid due process analysis provided by the rationality test. Because Section 27A(b) easily passes the rationality test, it does not contravene the Fifth Amendment Due Process Clause.

ARGUMENT

I. SECTION 27A(b) DOES NOT CONTRAVENE THE SEPARATION OF POWERS DOCTRINE.

In an exercise of its power to regulate commerce among the several States, U.S. Const., art. I, § 8, Congress amended the Securities Exchange Act by enacting Section 27A(b) to create a statute of limitation for Section 10(b) claims that were pending on June 19, 1991. The amendment conferred a new limited right to have that defined class of securities fraud cases reinstated for further review and adjudication on the merits by the Judicial Branch. In enacting Section 27A(b), Congress did not review or revise the final judgments previously entered. It did not deprive the courts of the power or authority to finally determine the outcome of the reopened cases or prescribe a rule for their decision. Section 27A(b) affected final judgments in the same way as other statutes that have been upheld as legitimate exercises of the Article I Legislative Power. Accordingly, Section 27A(b) does not unduly impair the fundamental authority of the judiciary to decide cases and controversies and does not contravene the separation of powers doctrine.

A. The Expiration Of The Time To Appeal Orders Dismissing Actions On Limitations Grounds Does Not Extinguish The Legislative Power To Prescribe A Longer Limitations Period For Such Actions.

The separation of powers doctrine is vital to the very existence of our constitutional government. *Bowsher v. Synar*, 478 U.S. 714, 724 (1986); *Buckley v. Valeo*, 424 U.S. 1

(1976). This Court has recognized, however, that the Framers intended that the doctrine be applied practically and flexibly – not dogmatically – and with due regard for the powers and intentions of the other coordinate branches. See *Mistretta v. United States*, 488 U.S. 361, 380-81 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *Nixon v. Administrator of General Services*, 408 F.Supp. 321 *aff'd* 433 U.S. 425 (1977); *United States v. Nixon*, 418 U.S. 683 (1974). The doctrine does not require that the three branches be entirely separate and distinct or that they operate with absolute independence. *Mistretta v. United States* 488 U.S. at 379; *Morrison v. Olson*, 487 U.S. at 694; see also *Nixon v. Administrator of General Services*, 408 U.S. at 442 (citing James Madison in *The Federalist* No. 47, and Joseph Story in 1 *Commentaries on the Constitution* § 525 (M. Bigelow, 5th ed. 1905)). In the words of Justice Jackson, which frequently appear in this Court's opinions, "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (concurring opinion).

Congress' legislative purpose is central to the application of Madison's flexible approach to the doctrine. As the Court of Appeals recognized, the "separation of powers . . . is not offended so long as the actions of one branch do not involve an attempt to increase the powers of that branch at the expense of the powers of another branch or usurp or impermissibly undermine the powers properly belonging to another branch." 1 F.3d at 1499,

Pet.App. at 25a, citing *Mistretta* and *Morrison*. (Emphasis added.)

Whether legislation affects rights confirmed in a "final judgment" is not the touchstone of constitutionality under the separation of powers doctrine. The line between a case that is "pending" and a case in which an order of dismissal with prejudice has become "final," to which Section 27A(b) applies, is drawn by Fed.R.App.P. 4 and 28 U.S.C. § 2107(a).⁸ If no notice of appeal is filed within the applicable time period after entry of a final order or judgment, the order or judgment becomes "final," in the sense that neither party has the right to seek further judicial review of the decision. It does not become "final" in the sense that on the last day of the period within which an appeal may be taken, Congress has full power to change the limitations period applicable to a case,⁹ and on the next day it has none whatsoever. There is no constitutional significance, in a separation of powers analysis, to the expiration of a time period that is

⁸ Congress has the constitutional power to establish and prescribe rules of practice and procedure for the courts. U.S. Const. art. I, § 8, cl. 9; U.S. Const. art. III, § 2. Fed.R.App.P. 4, which was promulgated pursuant to statutory authority contained in 28 U.S.C. § 2072(a), prescribes the time periods within which a notice of appeal permitted as of right from an order of the district court must be filed. Section 2107(a) states, in pertinent part, "[N]o appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."

⁹ See cases upholding the constitutionality of Section 27A cited in footnote 4.

within the Legislative Power to establish, particularly when that event purports to trammel the Legislative Power.

The separation of powers doctrine, and other constitutional provisions, not Fed.R.Civ.P. 4, provide the limits on the legislative power to reopen cases. It is unnecessary and unwise to undertake to formulate an abstract definition of those limits. Where Congress has made a political and policy judgment, however, that a defined class of cases should be permitted to proceed to an adjudication on the merits, Congress does not contravene the separation of powers doctrine when it acts to change the law to remove obstacles to an adjudication on the merits, just because the parties no longer have a right to appeal. The expiration of the time within which the parties may seek appellate review as of right does not establish the absolute and inviolable constitutional boundary for legislative power to modify a statute of limitations.¹⁰ That is particularly true where, as here, the shortened limitations

¹⁰ "[Statutes of limitations] are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. (Citation omitted) They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

period on which the case was dismissed was announced by the judiciary.¹¹

This Court has on several occasions rejected separation of powers attacks on legislation that embodied a political and policy judgment by Congress that certain cases that had been dismissed pursuant to final judgments should proceed. In *United States v. Sioux Nation*, 448 U.S. 371 (1980), this Court upheld the constitutionality of a 1978 statute directing an Article III court to reconsider *de novo* the merits of claims the lower court earlier had adjudged were barred by the doctrine of res judicata. The Court of Claims had ruled, in judgments which had become final, that claims asserted on behalf of Sioux Nation that the government had unlawfully taken the Black Hills region of the Great Sioux Reservation in violation of the Fifth Amendment were barred by the doctrine of res judicata.¹²

¹¹ It is ironic that had Congress attempted to effect the same result as this Court's decisions in *Lampf* and *Beam*, this Court likely would have stricken the statute as contravening the Due Process Clause unless the statute afforded a reasonable time to commence an action before the bar of the shorter period took effect. See *Ochoa v. Hernandez Y Morales*, 230 U.S. 139, 161-62 (1913) (Limitations periods may be modified to shorten the period, "but only if this be done while the time is still running, and so that a reasonable time still remains for the commencement of an action before the bar takes effect.").

¹² *United States v. Sioux Nation*, 207 Ct.Cl. 234, 518 F.2d 1298 (1975). The Court of Claims held that the Sioux' taking claim was barred by the res judicata effect of its 1942 decision in *Sioux Tribe v. United States*, 97 Ct.Cl. 613 (1942), cert. denied, 318 U.S. 789 (1943).

In response to this perceived injustice, Congress passed a statute (the "1978 Amendment") directing the Court of Claims to review the Sioux taking claims on the merits without regard to the defenses of *res judicata* and collateral estoppel.¹³ Acting pursuant to the 1978 Amendment, the Court of Claims reviewed the merits of the dispute and entered judgment in favor of the Sioux Nation. On appeal to this Court, the Government argued that the 1978 Amendment contravened the separation of powers doctrine because it impermissibly disturbed the finality of a judicial decree by rendering the earlier final judgments mere advisory opinions and because it effectively "reviewed and reversed" that court's earlier final judgments.

¹³ The statute, Pub.L. 95-243, 92 Stat. 153, amending section 20(b) of the Indian Claims Commission Act of 1946, 25 U.S.C. § 70s(b)(1976 ed., Supp. II), provided:

Notwithstanding any other provision of law, upon application by the claimants within thirty days from the date of the enactment of this sentence, the Court of Claims shall review on the merits, without regard to the defense of *res judicata* or collateral estoppel, that portion of the determination of the Indian Claims Commission entered February 15, 1974, adjudging that the Act of February 28, 1877 (19 Stat. 254), effected a taking of the Black Hills portion of the Great Sioux Reservation in violation of the fifth amendment, and shall enter judgment accordingly. In conducting such review, the Court shall receive and consider any additional evidence, including oral testimony, that either party may wish to provide on the issue of a fifth amendment taking and shall determine that issue *de novo*.

This Court rejected those separation of powers attacks and upheld the constitutionality of the 1978 Amendment, stating:

When Congress enacted the amendment directing the Court of Claims to review the merits of the Black Hills claim, it neither brought into question the finality of that court's earlier judgments, nor interfered with that court's judicial function in deciding the merits of the claim. When the Sioux returned to the Court of Claims following passage of the amendment, they were there in pursuit of judicial enforcement of a new legal right. Congress had not "reversed" the Court of Claims' holding that the claim was barred by *res judicata*, nor, for that matter, had it reviewed the 1942 decision rejecting the Sioux' claim on the merits. As Congress explicitly recognized, it only was providing a forum so that a new judicial review of the Black Hills claim could take place. This review was to be based on the facts found by the Court of Claims after reviewing all the evidence, and an application of generally controlling legal principles to those facts. For these reasons, Congress was not reviewing the merits of the Court of Claims' decisions, and did not interfere with the finality of its judgments.

* * *

In sum, as this Court implicitly held in *Cherokee Nation*, Congress' mere waiver of the *res judicata* effect of a prior judicial decision rejecting the validity of a legal claim against the United States does not violate the doctrine of separation of powers.

The Court of Appeals distinguished *Sioux Nation* on the basis of the identity of the parties. It read *Sioux Nation* to hold only that Congress may waive its own res judicata defense in the exercise of its power to pay the government's debts, and not that Congress may waive the res judicata defense for private litigants. That distinction, however, is relevant to a due process analysis, rather than a separation of powers analysis. The separation of powers analysis addresses whether Section 27A(b) encroaches on the Judicial Power, not on the nature of the rights affected.¹⁴ The effect of Section 27A(b) and the 1978 Amendment with respect to the final judgments of both Article III courts was identical. The procedures for implementation selected by Congress were virtually identical. Both statutes involved rare instances in which Congress made a political and policy judgment that previously dismissed cases should be allowed to proceed.

A narrow reading of *Sioux Nation* also is inconsistent with this Court's rulings that separation of powers protections are not freely waivable. See *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986). This Court certainly would not have upheld the 1978 Amendment if it had believed that Congress' purpose was to increase its own powers at the expense of the Judicial Branch. Cf. *Id.* at 856. As it was, this Court knew that Congress' purpose was not to encroach on the Judicial Power, but to relieve injustice.

¹⁴ "[T]he asserted ability of Congress to disturb rendered final judgments does not hinge on the nature of the judgment and its property value to the prevailing litigant." *Plaut v. Spendthrift Farm*, 1 F.3d at 1494 n. 12; Pet.App. at 14a.

The separation of powers issue in this case is fully answered by the principles in *Sioux Nation*, but that case does not stand alone as precedent. This Court has repeatedly upheld statutes which affected final judgments on many other occasions for many reasons. See *Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899); *Freeborn v. Smith*, 69 U.S. (2 Wall.) 160 (1864); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855); *Sampeyreac v. United States*, 32 U.S. (7 Pet.) 222, 239 (1833). *Cherokee Nation*, *Freeborn* and *Sampeyreac* all upheld legislation that affected rights fixed by final judgments of non-Article III territorial courts. None of those decisions, however, based its holding on any suggestion that final judgments of the territorial courts were less final than those of Article III courts.

Congress and the courts indeed "share" the power to say when the court's word on a particular controversy is its last, as the Fifth Circuit held in *Pacific Mut. Life Ins. v. First Republicbank*, 997 F.2d 39 (5th Cir. 1993). The absolute rule that final judgments are sacrosanct under the separation of powers doctrine, which was adopted by the Sixth Circuit in the opinion below, cannot be squared with this Court's prior decisions or the Constitution. Legislation affecting matters confirmed in judgments that have become final is not *ipso facto* invalid under the separation of powers doctrine, particularly when the legislation embodies a political and policy judgment that obstacles to the adjudication of a defined group of claims on their merits should be removed. The separation of powers analysis should focus on whether Congress' legislative purpose is to trammel or interfere with the fundamental

judicial power and authority to decide cases and controversies, and not on whether the period within which the parties may seek judicial review of the order of dismissal has expired. See *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. at 856; *Bowsher v. Synar*, 478 U.S. at 727. Because of the myriad circumstances in which such separation of powers questions can arise, no bright lines can be drawn, and the determination must be made on a case-by-case basis. Rejection of a rigid and absolute rule honors the flexibility contemplated by the Framers and promotes the ability of this Court to dispense justice.¹⁵

B. Section 27A(b) Was A Valid Exercise Of The Article I Legislative Power.

1. Section 27A(b) Does Not Encroach Upon Or Impair The Judicial Power.

Section 27A(b) poses no threat to the Judicial Power or to the republic. It does not impair the fundamental

¹⁵ Congress' power to enact legislation affecting matters confirmed in final judgments obviously is limited, and this Court has not hesitated to strike down legislation which unduly threatens the Judicial Power to decide cases. Congress clearly cannot reverse results in particular controversies between private individuals. See *United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 648 (1875). It cannot pass prospective statutes that would have the effect of rendering final judgments mere advisory opinions. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). Retroactive legislation that "prescribe[s] a rule for the decision of a cause in a particular way" without changing in the underlying law is invalid. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871).

power of the federal courts to decide cases or their ability to perform their essential judicial functions. To the contrary, Section 27A(b) represents a valid exercise of the Article I Legislative Power which fully respects and preserves the Article III Judicial Power.

There is no constitutionally significant distinction, in the context of the separation of powers analysis, between the operation of the 1978 Amendment on the final judgments of the Court of Claims in *Sioux Nation* and the operation of Section 27A(b) on the final judgment of the District Court dismissing the instant case. In neither case did Congress "[bring] into question the finality of [the] court's earlier judgments," *Sioux Nation* at 406, nor did it "interfere[] with [the] court's judicial function in deciding the merits of the claim," *id.*, nor did it "review or reverse" earlier judicial decisions. *Id.* The Petitioners, as did the Sioux, returned to court to enforce a new legal right pursuant to a procedure prescribed by Congress in the legitimate exercise of an enumerated legislative power. In both cases, Congress left the judicial functions of finding facts and applying the newly applicable law entirely to the judiciary.

Section 27A(b) has been variously characterized as "setting aside," "revising," "vacating" and "nullifying" the final judgments of the courts. A close examination of the actual effect of Section 27A(b) on the District Court's judgment in this case belies those characterizations. The District Court's Order of Dismissal embodied judicial determinations (i) that under *Lampf* and *Beam*, the applicable limitations period on August 13, 1991, was Section 9(e) of the Securities Exchange Act; (ii) that the Petitioners' complaint was not timely under Section 9(e); and

(iii) that, based on the law as the Court found it on August 13, 1991, the Respondents were entitled to an order granting their motions to dismiss. Section 27A(b) does not question, set aside, revise, vacate or nullify any of those judicial determinations. To the contrary, it respects and abides by them.

Had Congress not created new federal rights by prescribing a new limitations period, but simply "set aside" the judgments that the claims were time-barred under *Lampf* and *Beam*, this Court would not hesitate to strike such a statute on separation of powers grounds. Similarly, if this case had been adjudicated fully on the merits, with a jury verdict and final judgment in favor of the Petitioners, and if Congress had attempted to "set aside" that final judgment with instructions to enter judgment in favor of the Respondents, the result would be the same. See *United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 648 (1875). Such is not the case with Section 27A(b).

Section 27A(b) changed the law. Congress conferred a new limited right on the Petitioners to make application to have their claims reinstated and adjudicated under the new limitations period Congress created on December 19, 1991. It did not "order" the court to reinstate the Petitioners' claims. It simply directed the Court to adjudicate claims presented to it which arise under federal law (Section 27A(b)) in the same sense that it directs the federal courts to adjudicate claims every time it creates a cause of action over which the federal courts have subject matter jurisdiction. Congress provided that, if the courts make a judicial determination that the applicants meet the statutory standard for relief, they will be entitled to proceed under the new statute of limitations.

Although Section 27A(b) clearly affected an order of dismissal on limitations grounds which subsequently became final, it did not nullify, revise or set the order of dismissal itself aside. As in *United States v. Sioux Nation*, Congress simply created a new limitations period, an area in which the Legislative Power is generally recognized as paramount, *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), and a new right to a further judicial determination of the merits of the Petitioners' claims.

The enactment of Section 27A(b) did not constitute an exercise of the Judicial Power by Congress.¹⁶ Congress did not find any facts, determine the application of Section 27A(b) to any case, attempt to award or reverse a judgment, grant a new trial, or interfere with the administration of justice. It changed the law and created a new right of action. All judicial functions relating to the adjudication of the new rights conferred by Section 27A(b) were left entirely and exclusively to the judiciary.

Section 27A(b) does not trammel the fundamental power and authority of the Judicial Branch to decide past, present or future cases and controversies. It did not constitute an exercise of the Article III Judicial Power. To the contrary, it constituted a valid exercise of the Article I Legislative Power. Therefore, Section 27A(b) does not contravene the separation of powers doctrine.

¹⁶ The judicial power necessarily involves adjudication – undertaking to "determine facts, apply a rule of law to those facts, and thus arrive at a decision" – these bring "necessary . . . conditions for the exercise of federal judicial power." *Freytag v. Commissioner*, 501 U.S. 868 (1991).

2. Section 27A(b) Does Not Violate The Principle Of Hayburn's Case.

The Respondents' separation of powers argument, which was adopted in the opinion below, rests entirely on *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) and its historical antecedents. The Sixth Circuit cited *Hayburn's Case* as standing for the principle that "Congress may not retroactively disturb final judgments of the Federal courts," 1 F.3d at 1493, Pet.App. at 13a, and held that Section 27A(b), by allowing Congress to sit as a "court of errors," was an impermissible exercise of the Judicial Power.

The problem in *Hayburn's Case* arose after Congress enacted a 1792 statute which provided that disabled Revolutionary War veterans could seek federal pensions by making application to the circuit court. The Court would make findings regarding whether the applicant was a veteran and disabled, certify to the Secretary of War that the applicant was entitled to a pension, and render an opinion regarding the applicant's degree of disability. The statute, however, empowered the Secretary of War to withhold the applicant's name from the pension list for various reasons, and to report to Congress if he had reason to suspect "imposition or mistake." Section 4, 1 Stat. 244. The statute therefore subjected the circuit courts' decisions to discretionary review or suspension by the Secretary of War and Congress.

Hayburn's Case became moot¹⁷ before the constitutionality of the pension statute came before this Court.

¹⁷ The provision at issue was repealed before it could be considered by this Court. See 2 U.S. (2 Dall.) at 408; Act of Feb. 28, 1793, ch. 17, 1 Stat. 324.

Nevertheless, five Justices, in their capacity as circuit judges, expressed their views on the validity of the statute in letters to President Washington.¹⁸ Chief Justice Jay and Justice Cushing addressed this separation-of-powers issue, and stated that

by the constitution . . . the government . . . is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either . . . neither the secretary of war, nor any other executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.

2 U.S. (2 Dall.) at 410-411. Other constitutional concerns involved the justiciability of proceedings under the pension statute. The Justices expressed the view that the business directed by the statute was "not of a judicial nature," and therefore, the circuit courts could not proceed as Article III courts.¹⁹

Hayburn's Case, and its progeny, primarily address the justiciability of cases and controversies as to which, because of existing legislation, the courts are unable to provide final relief. The separation of powers principle stated in *Hayburn's Case* is that Congress may not enact a

¹⁸ The letters are collected in a note to *Hayburn's Case*, 2 U.S. (2 Dall.) at 410-414.

¹⁹ 2 U.S. (2 Dall.) at 411. This was an early expression of the Court's refusal to issue advisory opinions. "A judicial declaration subject to discretionary suspension by another branch of government may easily be characterized as an advisory opinion." 13 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3529.1 at 302 (1984).

statute which impairs the ability of the courts to decide a class of future controversies by subjecting its judgments to subsequent review and revision. It does not establish a constitutional principle that "Congress may not retroactively disturb final judgments of the Federal courts," as the Court of Appeals found.

Section 27A(b) offends neither the separation of powers nor the justiciability principles of *Hayburn's Case*. Congress did not sit as a "court of errors" when it passed Section 27A(b), nor did it direct business of a non-judicial nature to the courts. *Hayburn's Case* simply provides no authority for the Respondents.

Congress enacted Section 27A(b) in a valid exercise of the enumerated power to regulate interstate commerce. Although the affected orders of dismissal were "final" in the sense that the time within which the parties could seek appellate review as of right had expired, Section 27A(b) did not set aside, annul or vacate any judicial determination. It conferred new legal rights, but left the application of the new law to the facts, and all other judicial functions, to the courts. Therefore, Section 27A(b) does not encroach upon or impair the Judicial Power and does not contravene the separation of powers doctrine.

II. SECTION 27A(b) DOES NOT CONTRAVENE THE FIFTH AMENDMENT DUE PROCESS CLAUSE.

Section 27A(b) clearly passes muster under the test of due process by which the constitutionality of retroactive legislation is measured and, therefore, it did not deprive the Respondents of any property or rights in violation of the Fifth Amendment Due Process Clause.

A. Section 27A(b) Furthered A Legitimate Legislative Purpose By Rational Means.

The test of due process against which retroactive legislation is measured is well established. "[T]he test of due process" for the "retroactive aspects of [economic] legislation, as well as the prospective aspects," is whether they advance "a legitimate legislative purpose furthered by rational means." *General Motors Corp. v. Romein*, 112 S.Ct. 1105, 1112 (1992), quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). See also *United States v. Sperry Corp.*, 493 U.S. 52, 64-65 (1989); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) ("legislation . . . is not unlawful solely because it upsets otherwise settled expectations"). The due process concern addressed by the rationality test is that retroactive legislation presents greater problems of unfairness because "it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 112 S.Ct. at 1112.

Section 27A(b) easily meets that standard. Few, if any, question the injustice visited on the Petitioners by the wholly unexpected change in the limitations period governing the adjudication of securities fraud claims on their merits.²⁰ The removal of that procedural obstacle was an

²⁰ *Lampf* changed the rules in the middle of the game for thousands of fraud victims who already had suit pending - applying a shorter statute of limitations than when they brought their suits. The Supreme Court's decision in *Lampf*, June 20, 1991, in effect frees Michael Milken and scores of other felons and defendants of responsibility to pay back the people they have swindled. . . . All we seek is to give the victims a fair day in

entirely legitimate legislative purpose, which served the public interest²¹ as well as the private interests of thousands of defrauded investors whose legitimate expectations were upset by the Court's decision in *Lampf*.

The means chosen by Congress were entirely rational. Rather than burdening litigants with the task of initiating entirely new actions and the courts with having to process those new actions back to their procedural postures on June 19, 1991, Congress devised the procedural expedient of the motion to reinstate – the same procedure Congress specified in the 1978 Amendment, which was upheld in *Sioux Nation*. That procedural mechanism conserved judicial resources and prevented further unnecessary delay and expense in the resolution of these cases on the merits.

Section 27A(b) also is entirely consistent with the due process concern addressed by the rationality test – the preservation of the settled expectations of the parties. Far from upsetting the settled expectations of the parties, Section 27A(b) restored them.²² Because Section 27A(b)

court." 137 Cong.Rec. S18624 (daily ed. November 27, 1991) (Sen. Bryan).

²¹ This Court has recognized the desirability of private enforcement of the securities laws as a supplement to SEC action. See *Grace v. Ludwig*, 484 F.2d 1262, 1267 (2d Cir.) cert. denied, 416 U.S. 905 (1974), citing *J. I. Case v. Borak*, 377 U.S. 426 (1964). See also, *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972).

²² It was this Court's decision in *Lampf* that upset the settled expectations of all of the parties at the time this action was filed. Section 27A(b) had the effect of restoring and protecting – not upsetting – those settled expectations. Therefore, the due

embodied a legitimate legislative purpose furthered by rational means, it meets the constitutional test of due process, and therefore, does not contravene the Fifth Amendment Due Process Clause.

B. Section 27A(b) Does Not Deprive Respondents Of Property Or Rights In Violation Of The Fifth Amendment Due Process Clause.

The Respondents cannot claim a property interest in the final judgment that is any stronger than other property rights recognized by the law. Moreover, to the extent Section 27A(b) deprived the Respondents of any property, it nevertheless did so under circumstances and in a manner that passes the due process test under the Fifth Amendment Due Process Clause.

1. The Respondents' Interest In The Judgment Is Entitled To No Greater Protection Than Other Property Rights.

Whatever rights may accrue to a party as the result of the entry of a final judgment clearly are not absolute. A final judgment is "final" in the sense that it is a judicial determination as to which there is no further right to seek appellate review. It is not "final" in the sense that the rights fixed by it are graven in stone absolutely and forever. The courts have the power and authority to set aside their own final judgments pursuant to Fed.R.Civ.P. 60(b), thereby divesting the parties of the rights flowing

process concern that generally subjects retroactive legislation to scrutiny is simply not raised by Section 27A(b).

from a judgment. See *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988). While the discretion of a Court to set aside a judgment under Rule 60(b) is not without limits, the very existence of that power negates any argument that property rights a party may have in a final judgment are sacrosanct or enjoy absolute constitutional protection. Similarly, in the exercise of the Legislative Power, Congress may create new rights which change or dilute rights fixed in a final judgment, provided the retroactive legislation passes the due process rationality test. See *General Motors Corp. v. Romein*, 112 S.Ct. 1105, 1112 (1992), quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984).

Far from being absolute, rights in a final judgment are no stronger or more vested for due process purposes than other property rights, such as rights under a contract or title to real property. As this Court stated in *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947), "rights acquired by judgments have no different standing" for due process purposes than other rights. That is logical. When property rights are sufficiently doubtful or disputed that they become the subject of litigation, there is no reason why those underlying property rights, when determined and confirmed in a final judgment, should be any stronger or entitled to greater constitutional protection than underlying property rights that are sufficiently clear to be beyond dispute.²³

²³ A judgment clearly gives rise to additional rights, such as the right to a judicial lien and the right to mandatory process to enforce it. While those additional rights flow from the judgment, they do not confer a greater property interest in the

Because a final judgment does not confer property rights that are entitled to greater protection for due process purposes than other property rights, Congress may enact legislation affecting rights under final judgments so long as the legislation meets the due process rationality test described above.

2. Section 27A(b) Did Not Divest Respondents Of Property In Violation Of The Due Process Clause.

The Court of Appeals clearly stated that the primary basis of its decision was the separation of powers doctrine and not what it referred to as "this so-called 'vested rights doctrine.'" 1 F.3d at 1497 n.12, Pet.App. at 14a. The Court appears to denigrate the vested rights doctrine, as applied to this case, by affirming Congress' traditional legislative power to amend, repeal, or even extend statutory time limits, and observing that "[w]here Congress changes or supersedes such time limits, no litigant can properly assert a continuing or vested right to the old time limit," 1 F.3d at 1495, Pet.App. at 18a, citing *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801); *Campbell v. Holt*, 115 U.S. 620 (1885); and *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). The court, however, stated that, at least as a general matter, *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898), the origin of the vested rights doctrine, is still good law. Subsequent cases and doctrinal developments, however, call its general

judgment itself or enhance the underlying property rights on which it is predicated.

value as precedent in a due process analysis of the constitutionality of retroactive legislation into serious question.²⁴ That is particularly true as the doctrine is applied to the facts of this case.

The Fifth Amendment Due Process Clause was considered the source of the constitutional protection of the judgment which gave rise to the "vested rights" in *McCullough*. *Hodges v. Snyder*, 261 U.S. 600, 602 (1923). This Court, however, has since criticized the use of the words "vested right" to describe constitutionally protected property rights.

[T]he words "vested right" are nowhere used in the constitution, neither in the original instrument nor in any of the amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact

²⁴ It is important to segregate the separation of powers analysis from the due process analysis when considering the constitutionality of Section 27A(b). If legislation violates the separation of powers doctrine, then a party's interest in the final judgment is "vested," not by virtue of any *property* interest he possesses in the judgment, but by virtue of constitutional limitations on the Article I Legislative Power. Conversely, if legislation affecting matters adjudicated to a final judgment is within the Legislative Power, under the separation of powers doctrine, only then arise the issues of (i) the nature and extent of any property interest the Respondents may have in a final judgment and (ii) whether the legislation deprives them of that interest in violation of the Fifth Amendment Due Process Clause.

term, as the phrase itself is not one found in the language of the constitution.

Campbell v. Holt, 115 U.S. 620, 628 (1885).

Furthermore, the principle that the Due Process Clause absolutely protects all final judgments from retroactive legislation, if it ever existed, is no longer valid. In *Fleming v. Rhodes*, 331 U.S. 100 (1947), landlords had obtained final judgments in Texas state court permitting them to evict their tenants after wartime price regulations had lapsed. Congress subsequently enacted legislation curing the lapse and prohibited the eviction of tenants. A price control administrator sought injunctions against the landlords and state officials from executing on their judgments. The District Court held that the statute violated the Fifth Amendment Due Process Clause. This Court reversed and held that Congress could protect housing in defense areas "notwithstanding these prior judgments." 331 U.S. at 107. While the legislation in *Fleming* did not "set aside" final judgments, it did for all practical (and due process) purposes "nullify" them by precluding the prevailing parties from enforcing them. See *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 313 (1945) ("[I]t is troublesome to sustain as a right a claim that can find no remedy for its invasion."). Whatever "rights" the landlords had in their judgments were rendered worthless (nullified) by the price control legislation.²⁵

²⁵ See also *Federal Housing Admin. v. Darlington, Inc.*, 358 U.S. 84, 91 n.6 (1958) ([A]ny "vested" rights by reason of the state judgment were acquired subject to the possibility of their dilution through Congress' exercise of its paramount regulatory power.)

There is nothing unique or different about property rights confirmed in final judgments that excepts them from the generally applicable due process rationality test discussed above. Since Congress has the power to dilute or impair rights arising from final judgments by retroactive legislation, so long as it passes the rationality test, whatever "vested rights" a party may have in a final judgment simply are not vested absolutely. Because Section 27A(b) passes constitutional muster under the rationality test, the dilution or withdrawal by Congress of whatever "vested rights" the Respondents may have had in their final judgments of dismissal on limitations grounds did not contravene the Fifth Amendment Due Process Clause.

◆

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be reversed.

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